2013 IL App (1st) 120087-U

FIFTH DIVISION
NOVEMBER 1, 2013

No. 1-12-0087

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of
Plaintiff-Appellee,	)	Cook County.
v.	)	No. 06 CR 15120
ANTONIO RAYMOND,	)	Honorable Diane Cannon,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Taylor concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's postconviction petition was properly dismissed at the first stage because there is no arguable basis in fact or law that defendant's trial counsel was ineffective, since defendant was not prejudiced by counsel's conduct.

¶ 2 Following a jury trial, defendant Antonio Raymond was convicted of predatory criminal sexual assault of a child and was sentenced to 20 years in the Illinois Department of Corrections. We affirmed his conviction and sentence on direct appeal. *People v. Raymond*, 404 Ill. App. 3d 1028, 1030 (2010). Defendant then filed a petition for postconviction relief, in which he claims

that his trial counsel was ineffective for coercing him into waiving his constitutional right to testify. The postconviction petition was denied at the first stage of the proceedings, and defendant appeals. We affirm.

¶ 3 BACKGROUND

¶ 4 A detailed recitation of the events at defendant's trial are included in our opinion on direct appeal. *Raymond*, 404 Ill. App. 3d at 1031-39. Here, we relate only those facts necessary to our decision on defendant's postconviction petition and, where applicable, relate the facts as set forth in our previous opinion.

¶ 5 I. Pretrial Proceedings

¶ 6 On June 7, 2006, 23-year-old defendant Antonio Raymond was arrested when police officers entered a house in which they discovered defendant and 12-year-old KS (victim) on a bed, both naked from the waist down. Defendant was charged with predatory criminal sexual assault of a child. 720 ILCS 5/12-14.1(a)(1) (West 2008).

¶ 7 Prior to trial, the State moved *in limine* to bar defendant from referencing his belief that the victim was over the age of 17, arguing that a mistake of age was not a valid defense to the charge of predatory criminal sexual assault of a child. Defendant responded that the victim told police that she was 19 and later told them she was 15; one officer's arrest report stated that defendant told police that "[s]he told me she was nineteen years old." Defendant argued that the victim's statements as to her age were relevant to her credibility. The trial court granted the State's motion and denied defendant the use of a mistake of age defense.

¶ 8 Additionally, the State moved *in limine* for the trial court to allow other crimes evidence

concerning defendant's prior conviction for aggravated criminal sexual abuse of a victim named JP, as well as evidence of an alleged sexual assault against a woman named SM. The trial court granted the State's motion regarding both JP and SM. However, later the trial court granted defendant's motion to reconsider as to SM.

¶ 9 II. Trial

¶ 10 Defendant's trial began on September 9, 2008. During the State's case-in-chief, Chicago police department officers John Beluso and John Tait[1] testified as to the events that occurred on June 7, 2006. Officer Beluso testified that he and his partner were called to a two-story house on South Ingleside Avenue concerning a reported criminal trespass in progress. They were met at the building by Officer Tait and two other officers. When the police officers arrived, the front door was partially open and the officers entered the building.

¶ 11 Officer Beluso described the house as "abandoned," testifying that "it was dirty. There was clothes everywhere. It's obviously that no one lived there"; Officer Tait also described the building as "an abandoned house." Officer Tait testified that when he entered the house, he observed litter throughout the house and that the house "[s]melled pretty bad."

¶ 12 Officer Tait then testified that, shortly after entering, he heard "movement" and "shuffling" coming from the second floor, which began to resemble squeaking sounds, and the officers went upstairs. Once at the top of the stairs, Officer Tait determined that the sounds were coming from a bedroom and the officers proceeded to the bedroom, which Officer Tait testified

[1] Officer Tait's name is spelled in a number of ways throughout the parties' briefs and the record. For the sake of consistency, we will adopt the spelling "Tait."

had no door. Once at the bedroom, Officer Tait stood in the doorway while Officer Beluso stood behind him. Officer Tait testified that he had an unobstructed view into the bedroom and observed two individuals, who he identified as defendant and the victim, on a bed approximately five to seven feet away. Officer Tait testified that the victim looked "young, like [a] teenager."

¶ 13 Officer Tait then entered the bedroom, where he heard grunting noises coming from defendant and the victim, and noticed that both were naked from the waist down. The victim was lying on her back, with her arms around defendant's back, and her legs were "[s]pread wide open." Defendant was lying on top of the victim's pelvic area, their hips were touching, and his legs were between hers. Defendant's buttocks were "moving up and down" in what Officer Tait described as a "humping fashion." Officer Tait testified that he observed them for a second or two and his first impression was "[t]hat they were having intercourse." Officer Tait ordered defendant to stand up, and when he did, Officer Tait noticed that defendant's penis was wet and erect. Officer Tait then arrested defendant, charging him with criminal trespass to land.

¶ 14 On cross-examination, Officer Tait admitted that his supplemental report failed to state some of the details that he testified to on direct examination. The report failed to state that Officer Tait heard grunting noises, that the victim was on her back with her hands on defendant's back, and that the victim's legs were spread. Additionally, the report did not state that defendant was moving in a "humping" fashion, nor that defendant's penis was wet and erect. Finally, the report did not state that the victim looked young nor that Officer Tait thought that they were engaged in sexual intercourse. Officer Tait did not prepare any reports in addition to the supplemental report.

¶ 15 Officer Tait further admitted that he did not observe defendant's penis inside the victim's vagina, nor did he observe defendant's penis touch the victim. Additionally, the victim was not screaming or crying, and initially, defendant was not arrested for any sexual offense.

¶ 16 Officer Beluso also testified that when he entered the bedroom, he observed defendant lying in a bed with the victim, both of whom were naked from the waist down. The victim's legs were spread open and the defendant was lying in between them while making a "thrusting motion up and down." Officer Beluso testified that Officer Tait told defendant to stand up and when he did, Officer Beluso observed that defendant's penis was erect.

¶ 17 On cross-examination, Officer Beluso conceded that his arrest report did not state that he observed defendant "on top" of the victim. Additionally, Officer Beluso admitted that defendant was arrested for criminal trespass to land and not for any sexual offense.

¶ 18 In addition, JP, the victim from defendant's prior conviction for aggravated criminal sexual abuse, testified at the trial. In August of 2002, JP lived at the Hulton Children's Home, a group home which was operated by the Department of Children and Family Services (DCFS) and accepted residents up to 21 years old. On cross-examination, JP admitted that she was considered a "runaway" and a "runner" at the time. JP was 14 years old, while defendant, who was also a resident, was 19.

¶ 19 On August 3, 2002, JP and five other residents, including defendant, left the dormitory after curfew and went to a nearby shed. Inside the shed, defendant and JP had sexual intercourse. At the time, JP was unaware of defendant's age. JP testified on cross-examination that the residents stayed in the shed for approximately eight hours and then left together. JP also

admitted that she only reported the incident because a staff member at the home interviewed her concerning the curfew violation and that defendant did not force her to go into the shed.

¶ 20 At the end of the State's case-in-chief, the parties stipulated to a certified record of defendant's guilty plea to aggravated criminal sexual abuse for the conduct involving JP. The certified record stated: "on or about August 3, 2002, [defendant] committed an act of sexual penetration with JP, who was at least 13 years of age, but under 17 years of age, and the Defendant had sexual intercourse with JP, that Defendant was at least five years older than JP." The State then rested its case.

¶ 21 Defendant did not present any evidence and did not testify at trial.

¶ 22 The jury found defendant guilty of predatory criminal sexual assault of a child, and defendant's later posttrial motion for a new trial was denied. After considering evidence in aggravation and mitigation, the trial court sentenced defendant to 20 years in the Illinois Department of Corrections and denied defendant's motion to reconsider the sentence.

¶ 23 III. Direct Appeal

¶ 24 On direct appeal, defendant raised six issues. First, he argued that his conviction should be reversed because the State failed to prove the element of sexual penetration beyond a reasonable doubt. Defendant further raised four issues that he claimed entitled him to a new trial: (1) that the trial court denied defendant a fair trial by refusing to allow him to argue mistake of age as a defense; (2) that the trial court erred in allowing evidence concerning defendant's prior conviction for aggravated criminal sexual abuse; (3) that the trial court violated Supreme Court Rule 431(b) during jury selection by not inquiring into all of the *Zehr* factors; and (4) that

the State prevented defendant from receiving a fair trial by inflaming jurors' passions through improper remarks during closing argument and rebuttal. Finally, defendant asked for a reduced sentence because he claimed that his sentence was excessive. We affirmed defendant's conviction and sentence. *Raymond*, 404 Ill. App. 3d at 1072.

¶ 25 IV. Postconviction Petition

¶ 26 On October 13, 2011, defendant filed a postconviction petition, claiming that his trial counsel was ineffective for a number of reasons. As relevant to the instant appeal, defendant claims that trial counsel was ineffective for "refusing to allow" him to testify in his own defense by falsely advising him about his right to testify. Defendant claims that trial counsel "knowingly provided" him with "false information" when counsel told him not to testify because his prior criminal history would be used against him, despite the fact that counsel should have known when he "lost" the motion to bar the State from introducing his prior crimes that it would be admitted against defendant "regardless." Additionally, defendant claims in his notarized affidavit that he would have testified that he did not have "sexual relations" with the victim, but trial counsel told him not to and told defendant that the defense "would call the victim to testify." Finally, defendant claims that trial counsel "prepped" him to "answer falsely to the trial court admonishments" concerning his waiver of his right to testify.

¶ 27 Defendant's postconviction petition was summarily denied at the first stage of the proceedings on November 17, 2011, as frivolous and patently without merit and as barred by *res judicata*. This appeal follows.

¶ 28 ANALYSIS

¶ 29 On appeal, defendant argues that his postconviction petition was improperly dismissed because he raised an arguable claim that trial counsel was ineffective for coercing him into waiving his right to testify and that he was prejudiced by trial counsel's conduct.

¶ 30 I. Stages of a Postconviction Proceeding

¶ 31 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2000)) provides a means by which a defendant may challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006) (citing *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005)). To be entitled to postconviction relief, a defendant must show that he or she has suffered a substantial deprivation of his or her federal or state constitutional rights in the proceedings that produced the conviction or sentence being challenged. 725 ILCS 5/122-1(a) (West 2000); *Pendleton*, 223 Ill. 2d at 471 (citing *Whitfield*, 217 Ill. 2d at 183).

¶ 32 In noncapital cases, the Act provides for three stages. *Pendleton*, 223 Ill. 2d at 471-72. At the first stage, the trial court has 90 days to review a petition and may summarily dismiss it, if the trial court finds that the petition is frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2000); *Pendleton*, 223 Ill. 2d at 472. If the trial court does not dismiss the petition within that 90-day period, the trial court must docket it for further consideration. 725 ILCS 5/122-2.1(b) (West 2000); *Pendleton*, 223 Ill. 2d at 472.

¶ 33 The Illinois Supreme Court has held that, at this first stage, the trial court evaluates only the merits of the petition's substantive claim, and not its compliance with procedural rules.

People v. Perkins, 229 Ill. 2d 34, 42 (2007). The issue at this first stage is whether the petition presents an "arguable basis either in law or in fact" that he has suffered a substantial deprivation of his constitutional rights. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009).

¶ 34 At the first stage, the trial court "examines the petition independently, without input from the parties." *People v. Brown*, 236 Ill. 2d 175, 184 (2010) (citing *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996)). The petition's allegations "must be taken as true and liberally construed." *Brown*, 236 Ill. 2d at 193. Additionally, "[i]n considering the petition, the trial court may examine the court file of the criminal proceeding, any transcripts of the proceeding, and any action by the appellate court." *Brown*, 236 Ill. 2d at 184 (citing 725 ILCS 5/122-2.1(c) (West 2006)).

¶ 35 In the case at bar, defendant's petition was dismissed at the first stage. However, if it had proceeded to the second stage, the Act provides that, at the second stage, counsel may be appointed for defendant, if defendant is indigent. 725 ILCS 5/122-4 (West 2000); *Pendleton*, 223 Ill. 2d at 472. After an appointment, Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) requires the appointed counsel: (1) to consult with petitioner by mail or in person; (2) to examine the record of the challenged proceedings; and (3) to make any amendments that are "necessary" to the petition previously filed by the *pro se* defendant. *Perkins*, 229 Ill. 2d at 42. Our supreme court has interpreted Rule 651(c) also to require appointed counsel "to amend an untimely *pro se* petition to allege any available facts necessary to establish that the delay was not due to the petitioner's culpable negligence." *Perkins*, 229 Ill. 2d at 49.

¶ 36 The Act provides that, after defense counsel has made any necessary amendments to the

petition, the State may move to dismiss it. *Pendleton*, 223 Ill. 2d at 472 (discussing 725 ILCS 5/122-5 (West 2000)). See also *Perkins*, 229 Ill. 2d at 43. If the State moves to dismiss, the trial court may hold a dismissal hearing, which is still part of the second stage. *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998). A trial court is foreclosed "from engaging in any fact-finding at a dismissal hearing because all well-pleaded facts are to be taken as true at this point in the proceeding." *Coleman*, 183 Ill. 2d at 380-81.

¶ 37 At a third-stage, evidentiary hearing, the trial court "may receive proof by affidavits, depositions, oral testimony, or other evidence," and "may order the petitioner brought before the court." 725 ILCS 5/122-6 (West 2000).

¶ 38 In the case at bar, defendant asks us to reverse the trial court's dismissal of his petition as frivolous and remand for second-stage proceedings. The question of whether a trial court's summary first-stage dismissal was in error is purely a question of law, which an appellate court reviews *de novo*. *Petrenko*, 237 Ill. 2d at 496; see also *Pendleton*, 223 Ill. 2d at 473. *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 39 Our supreme court has held that a trial court may summarily dismiss a petition as frivolous only if it has no arguable basis either: (1) in law; or (2) in fact. *Petrenko*, 237 Ill. 2d at 496 (citing *People v. Hodges*, 234 Ill. 2d 1, 16 (2009)). Our supreme court has explained that (1) a petition lacks an arguable basis in law "if it is based on an indisputably meritless legal theory, such as one that is completely contradicted by the record"; and that (2) it lacks an arguable basis in fact "if it is based upon a fanciful factual allegation, such as one that is clearly baseless,

fantastic or delusional." *Petrenko*, 237 Ill. 2d at 496 (citing *Hodges*, 234 Ill. 2d at 16-17).

¶ 40 II. Ineffective Assistance of Counsel

¶ 41 In the case at bar, defendant argues that his trial counsel was ineffective because defendant was coerced not to testify by counsel's advice that the State would introduce evidence of his prior sexual assault if he testified, despite the fact that the State was permitted to, and did, introduce the prior conviction as propensity evidence in its case-in-chief. Additionally, defendant wanted to testify but did not, because counsel promised him that the victim would testify in his defense and instead permitted himself to be "coached by counsel to 'falsely' waive his right to testify."

¶ 42 The Illinois Supreme Court has held that, to determine whether a defendant was denied his right to effective assistance of counsel, an appellate court must apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*)). Under *Strickland*, a defendant must prove both (1) his attorney's actions constituted errors so serious as to fall below an objective standard of reasonableness; and (2) absent these errors, there was a reasonable probability that his trial would have resulted in a different outcome. *People v. Ward*, 371 Ill. App. 3d 382, 434 (2007) (citing *Strickland*, 466 U.S. at 687-94).

¶ 43 Under the first prong of the *Strickland* test, the defendant must prove that his counsel's performance fell below an objective standard of reasonableness "under prevailing professional norms." *Colon*, 225 Ill. 2d at 135; *People v. Evans*, 209 Ill. 2d 194, 220 (2004). Under the second prong, the defendant must show that, "but for" counsel's deficient performance, there is a

reasonable probability that the result of the proceeding would have been different. *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. "[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome–or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *Evans*, 209 Ill. 2d at 220; *Colon*, 225 Ill. 2d at 135. In other words, the defendant was prejudiced by his attorney's performance.

¶ 44 To prevail, the defendant must satisfy both prongs of the *Strickland* test. *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. "That is, if an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient." *People v. Graham*, 206 Ill. 2d 465, 476 (2003). We do not need to consider the first prong of the *Strickland* test when the second prong cannot be satisfied. *Graham*, 206 Ill. 2d at 476.

¶ 45 Combining the standard for a first-stage summary dismissal with the standard for ineffective assistance of counsel, our supreme court has held that a postconviction petition alleging ineffective assistance of counsel may not be summarily dismissed, if: "(i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that defendant was prejudiced." *Petrenko*, 237 Ill. 2d at 497 (citing *People v. Golden*, 229 Ill. 2d 277, 283 (2008)).

¶ 46 In the case at bar, we cannot find that defendant was arguably prejudiced by trial counsel's conduct and, accordingly, affirm the dismissal of his postconviction petition at the first stage. Defendant argues that he was prejudiced by trial counsel's advice "as there was no reason

for Raymond *not* to testify that he did not have 'sexual relations' with KS given the absence of any defense case and the lack of any direct evidence of sexual penetration of KS – a required element of predatory criminal sexual assault." (Emphasis in original.) Defendant points to the lack of any statement from KS, the victim, and the absence of medical evidence to establish penetration, and argues that the officers' testimony was impeached and that, "had Raymond been able to testify that he did not penetrate KS, he could have refuted the officers' inferential testimonies that Raymond had begun intercourse when the officers came upon the pair." We do not find this argument persuasive.

¶ 47 First, we must make clear that "sexual penetration" in the context of predatory criminal sexual assault of a child is a statutorily defined term. In order to be convicted of predatory criminal sexual assault of a child, the accused must be 17 years of age or over, the victim must be under 13 years of age, and the accused must commit "an act of sexual penetration" with the victim. 720 ILCS 5/12-14.1(a)(1) (West 2008). "Sexual penetration" is further defined as "any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person ***. Evidence of emission of semen is not required to prove sexual penetration." 720 ILCS 5/12-12(f) (West 2008). Thus, to prove penetration, the State was required to prove only that defendant made contact, "however slight," with the victim's genitals. 720 ILCS 5/12-12(f) (West 2008).

¶ 48 Next, in our prior opinion, we addressed at length defendant's argument concerning "direct evidence" of penetration, which is similar to the argument he makes in the instant appeal. There, we noted:

"Defendant is correct in stating that there was no medical evidence showing redness or abrasions on the victim's vagina or semen present. However, the lack of semen or trauma to the victim's genitals is not dispositive of the issue of penetration. The statute itself explicitly states that '[e]vidence of emission of semen is not required to prove sexual penetration.' 720 ILCS 5/12-12(f) (West 2008). Similarly, courts have held that evidence of trauma is unnecessary because the statute considers penetration to have occurred as a result of '*any contact, however slight*, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person.' (Emphasis added.) 720 ILCS 5/12-12(f) (West 2008). For instance, the defendant in *People v. Moore* argued that without evidence of trauma and with the victim's hymen still intact there could not have been penetration. *People v. Moore*, 199 Ill. App. 3d 747, 773 (1990). We rejected that argument, holding that 'it is clear that the statutory definition does not require physical penetration but merely requires contact.' *Moore*, 199 Ill. App. 3d at 773. Thus, these factors are not necessary for a finding of penetration.

The most serious flaw in defendant's argument is his focus on direct evidence. While direct evidence in the form of testimony

> from the victim or in some other form would clearly be helpful in determining whether there was penetration, it is not required. The trier of fact is allowed to make reasonable inferences based on the evidence presented, and may find penetration in the absence of direct evidence." *Raymond*, 404 Ill. App. 3d at 1040-41.

¶ 49 In the case at bar, the jury heard testimony from two police officers that led to the inference that some contact occurred between defendant and the victim's genitals. Officer Tait testified that he heard grunting noises coming from the bedroom. Officers Tait and Beluso both testified that they observed defendant and the victim lying on a bed, naked from the waist down, with defendant on top of the victim. Both officers stated that the victim's legs were spread open and that defendant's legs were between hers. Both officers also explained that defendant was moving his buttocks; Officer Beluso characterized defendant as making a "thrusting motion up and down," while Officer Tait said that defendant was moving in a "humping fashion." Finally, when Officer Tait ordered defendant to stand up, both officers noticed that defendant's penis was erect, while Officer Tait also noticed that it was wet. In light of this testimony, we cannot find that defendant's testimony that he did not penetrate KS would have arguably changed the outcome of the trial. Consequently, his postconviction petition was properly dismissed at the first stage.

¶ 50 As a final matter, defendant argues in his reply brief that "when a fundamental individual right is denied, no prejudice need be shown." However, the cases that defendant cites concern the application of a plain-error analysis, not a review of a postconviction petition alleging

ineffective assistance of counsel, as in the case at bar. See *People v. Bracey*, 213 Ill. 2d 265, 270 (2004) (applying plain-error analysis to waiver of jury trial); *In re R.A.B.*, 197 Ill. 2d 358, 363 (2001) (same). Our supreme court has applied the two-prong *Strickland* analysis to claims of ineffective assistance of counsel raised in a postconviction petition and has specifically stated that ineffectiveness claims may be decided under the prejudice prong. *People v. Coleman*, 183 Ill. 2d 366, 397-98 (1998) ("Courts *** may resolve ineffectiveness claims under the two-part *Strickland* test by reaching only the prejudice component, for lack of prejudice renders irrelevant the issue of counsel's performance."). Moreover, our supreme court has decided cases based on the prejudice prong even when the claimed ineffectiveness involved the right to testify. *People v. Madej*, 177 Ill. 2d 116, 146 (1997), *overruled on other grounds*, *Coleman*, 183 Ill. 2d at 388 (changing standard of review from abuse of discretion to *de novo*). Thus, we may decide defendant's claim based on the prejudice prong and, since we find that defendant was not arguably prejudiced, we have no need to consider whether trial counsel's representation arguably fell below an objective standard of reasonableness. Accordingly, we affirm the dismissal of defendant's postconviction petition at the first stage because there is no arguable basis for his ineffectiveness claim.

¶ 51 CONCLUSION

¶ 52 Defendant's postconviction petition was properly dismissed at the first stage because there was no arguable basis for his claim of ineffective assistance of counsel, since he was not prejudiced by his failure to testify.

¶ 53 Affirmed.